

MEMORANDUM

TO: Board of Environmental Protection

FROM: Michael K. Mullen, Land Bureau, Augusta

DATE: September 20, 2001

RE: Amendment of Chapter 305 Permit By Rule Standards and Chapter 310 Wetland Protection Rules: Post to Hearing

Statutory and Regulatory Reference:

Chapter 310 Wetland Protection Rules and Chapter 305 Permit By Rule Standards are adopted pursuant to general statutory authority at 38 M.R.S.A. Section 341-D(1). Additionally, Chapter 305 is adopted under specific authority included in the Natural Resources Protection Act at 38 M.R.S.A. Section 480-H which requires the Board to adopt performance and use standards for regulated activities.

Location:

The Natural Resources Protection Act, and consequently Chapter 310 and Chapter 305, apply to activities affecting protected natural resources in the organized portions of the state.

Description:

The department requests permission to post to public hearing amendments to Chapter 305 Permit By Rule Standards and Chapter 310 Wetland Protection Rules in response to Legislative Resolve Chapter 116. The Resolve requires that the department develop rules (major substantive) to regulate cutting of vegetation adjacent to protected natural resources consistent with Municipal Shoreland Zoning ("SLZ") standards and standards administered by the Land Use Regulation Commission ("LURC") in the unorganized townships. A copy of the Resolve is attached for your information (Appendix A). Provided the Legislature approves changes to the Natural Resources Protection Act ("NRPA") that will regulate cutting and vegetation removal next to natural resources, these rule changes will be necessary in order to provide both a flexible yet protective licensing process for administering the new jurisdiction. The Board may recall that this background information was included in the Informational Session on "Stream Buffers" presented on July 19 by Don Witherill, Director of the Division of Watershed Management.

As directed by the Resolve, the department has reviewed and analyzed existing state regulation of cutting and vegetation removal adjacent to natural resources, with the exception of forestry practices (A separate Legislative Resolve directs the Maine Forest Service to develop statewide forestry standards around natural resources.) Municipal Shoreland Zoning regulates cutting and clearing vegetation for

development within a minimum of 75 feet of most natural resources with the exception of smaller first order and headwater streams. The LURC also regulates clearing for development with similar standards as SLZ but its jurisdiction extends to all natural resources, including small streams. The NRPA does not regulate cutting or vegetation removal adjacent to natural resources. However, some cutting and clearing has been regulated to a degree if associated with soil disturbance, which is the trigger for jurisdiction adjacent to natural resources.

Under both LURC and SLZ, standards exist that describe the level of cutting and vegetation removal allowed without any licensing or notification process. The LURC uses a licensing process for those clearing activities within 75 feet of a natural resource that do not meet the clearing (or development) standards. SLZ uses a variance process for those activities that exceed the clearing (or development) standard within the 75 foot setback (100 foot setback on great ponds).

Our proposal is that the Legislature amend NRPA to regulate clearing and vegetation removal adjacent to natural resources, then incorporate clearing standards as an exemption in the law. Further, the exemption would provide that those areas already subject to SLZ jurisdiction are not regulated under NRPA thereby avoiding any duplication of effort. This essentially means that the department will acquire jurisdiction over cutting activities on smaller streams above the limit of SLZ authority which is upgradient of where two perennial streams come together. These recommended statute amendments are included for your information as Appendix B.

Amendments to Chapter 305 Permit By Rule Standards (Appendix C):

Section 2 is being renamed “Activities adjacent to protected natural resources”. The term “adjacent to a protected natural resource” is being amended to be a 75 foot, not 100 foot, setback from the edge of the protected resource to be consistent with both SLZ and LURC jurisdictions. For activities adjacent to protected natural resources that do not meet the clearing standard proposed in the statute (or not allowed under another section of Permit by Rule such as a stream crossing), the department is proposing to add an “avoidance/minimization” standard to Section 2 much like the Tier I review process used by the department to license relatively small activities in certain types of freshwater wetlands. To accomplish this, an applicant demonstrates through a scaled site plan that due to lot size, configuration, soil types or slopes, there is no alternative but to locate the activity within the 75 foot setback from the stream. This is the reason for proposed amendments to Section 2(B) Submissions. As proposed, applicants need not hire consultants or other professionals in order to prepare a PBR Notification Form for submission to the department. Also, as a result of adding a “no practicable alternative” standard, it is necessary to add a definition of “practicable” to this section: it is the same as currently exists in Chapter 310 Wetland Protection rules. Because projects allowed under Section 2 will require an assessment by staff that an applicant has avoided and minimized their activity to the extent practicable, it is necessary to eliminate the waiver of the 14 day waiting period for certified contractors (see Sections 1(C)(1)(b) and 2(A)(4)).

Amendments to Chapter 310 Wetland Protection Rules (Appendix D):

Because this rule chapter is the basis for a full or individual licensing process under the NRPA and further defines the concepts of avoidance, minimization and compensation, it is necessary to amend this chapter to include “rivers, streams, or brooks” as natural resources subject to the rule. Accordingly, we propose to change the title of the Chapter to include “waterbodies”. Because cutting is now to be regulated adjacent to natural resources and allowed only to a specific amount, the definition of “Vegetation Removal or Displacement” is being deleted as it would conflict with the cutting standard

being proposed as an exemption. In Section 5 General Standards, several changes are also necessary. In Section 5A Avoidance, language is being eliminated that arguably would restrict the department's ability to require an alternatives analysis for activities adjacent to, but not in, the protected resource. Under Section 5(C)(2), proposed wording amendments will make it clearer and less redundant about when a functional analysis will be required. Lastly, it is proposed to add a project size limitation for activities affecting rivers, streams or brooks below which neither a functional assessment nor compensation will be required. The size limitation being proposed is the same as the limitations that existed in the old Stream Alteration Act, which originated in the early 1970's, and are still in use today.

While no changes are being proposed under the SLZ program at this time, LURC is amending their rules to include the point rating system already utilized in SLZ. This rating system is designed to ensure that a certain amount of woody vegetation remains in a well distributed fashion within the setback from the resource. The LURC is holding a public hearing on their proposed amendments on October 17, 2001: department staff will attend the hearing to provide information about the department's proposals if requested. A copy of LURC's proposed amendments is attached as Appendix E.

Environmental issues:

Currently, there is no regulation of cutting and vegetation removal adjacent to smaller streams in the organized towns, particularly those first order or headwater streams above the point where 2 perennial streams converge (this is the point at which municipal shoreland zoning takes jurisdiction). These amendments will increase the protection afforded to smaller streams by essentially adding clearing and development standards similar to those existing in SLZ. It is recognized that maintaining trees, shrubs, and ground cover adjacent to streams and other natural resources can provide a significant benefit to water quality, fisheries viability, as well as providing habitat for a variety of wildlife. The department has chosen to define "adjacent to", for regulatory purposes under the NRPA, to be 75 feet which closely mirrors existing SLZ and LURC setbacks on streams. Our research indicates that while a 75 foot setback is the minimum necessary when the objective is to provide wildlife habitat, flood mitigation and sediment removal, it provides ample buffering capabilities for nitrogen removal, water temperature moderation, bank stabilization and food source for aquatic fauna.

Department Recommendation:

The department recommends the Board post these rule amendments to public hearing on October 18, 2001, at 1:00.

Estimated Time of Presentation:

Approximately 25 minutes.